IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1553 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MARIAMBIBI WD/O REHEMUBHAI IMAMALI SINCE DEC.BY HER HEIRS

Versus

SHRI HUSNUDDIN ROSHANALI SINCE DECEASED BY HIS HEIRS

Appearance:

MR MA KHARADI for Appellant

MR KV SHELAT for Respondents No. 1/1 to 1/3

NOTICE SERVED for Respondent No. 1/1-1/2,2-8

CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 22/10/2002

ORAL JUDGEMENT

1. This first appeal by the original defendant no.1 is directed against the judgment and decree dated 25th

June, 1980 passed by the learned Principal Judge, City Civil Court in Civil Suit No.676 of 1976. The respondent no.1 is the original plaintiff, respondents no.2 to 7 are the original defendants no.2 to 7 and respondent no.8 is the original defendant no.9 in the suit. During the pendency of the appeal, the original appellant and respondent no.1 died and the heirs and legal representatives have been brought on record. The plaintiff's case, briefly stated, was as follows:

1.1 He was the owner of a house bearing Survey No.6765/D. It opens in the open space called a galiari bearing Survey No.6764/C measuring 18 square yards. After the open space and opposite to the plaintiff's house, there is the property of defendant no.1 bearing Survey Nos.6763/A and 6763/B. According to the plaintiff, the eastern wall of the property of the defendant no.1 was a blind wall and there were no apertures whatsoever in the said wall but the defendant no.1 had demolished the old house and had reconstructed a new house in its place and she had put a door in the said wall on the ground floor and had opened two windows on the upper floor. The defendant no.1 had also installed a water pipe for the discharge of rain water. The plaintiff contended that the defendant no.1 had no right to open the apertures and install the water pipe. The plaintiff requested the defendant no.1 to refrain from committing the said illegal act but the defendant no.1 did not pay heed. He had, therefore, filed Civil Suit No.3132 of 1975 for declaration and injunction but since it was likely to fail on account of a technical defect, it was withdrawn on 8th March, 1975 with permission to file a fresh suit on the same cause of action. The plaintiff contended that the defendant no.1 was liable to close the aperture in the eastern wall of the property and to keep the entire wall as per the earlier condition of the old house and to remove the water pipe. The plaintiff averred that the defendant no.1 had no right of way and no access of light and air through the said eastern wall of the property. He, therefore, filed the present suit for declaration that the defendant no.1 had no easement right over the suit property of the plaintiff bearing Survey No.6765/B and the said open space bearing Survey No.6764/C and that the defendant no.1 had no right or authority to open an aperture in the eastern wall of the property. The plaintiff also claimed a mandatory injunction directing the defendant no.1 to close the apertures which had been opened and to keep the wall completely blind.

1.2 The defendant no.1 was the only contesting

defendant. She denied that the open space bearing Survey No.6764/C was of the ownership of the plaintiff. According to her, it was open land and had been shown as the property of the ownership of the predecessors-in-title of the defendant. She contended that she was entitled to make use of the said open land as joint owner and that she has been using the same as such. She averred that she had constructed her house long time ago after getting the plan approved by the Corporation. She denied that the eastern wall of the house was blind as alleged by the plaintiff or that there was no aperture in it. She asserted that the door and windows existed even before the new construction was made.

1.3 The defendant no.2 who was the daughter of Sarfuddin Roshanali, the brother of the plaintiff, filed a purshis stating that the reply to the injunction filed by defendant no.1 be treated as written statement of both the defendants. Defendants no.3 to 7 were the heirs of Gulam Hussein, another brother of the plaintiff. They did not appear to contest the suit. Defendant no.9 who was the daughter of Gulam Hussein also did not enter appearance.

2. The learned Judge framed three issues arising from the pleadings of the parties as follows:

(1) It is proved that defendant no.1 has no right to put apertures in the eastern side wall of her properties bearing Survey No.6763/A and 6763/B and that she has no right to put water pipe for discharge of rainy water on the suit property bearing Survey No.6764/C and that she has no right of way or the right to enjoy light and air through the said Survey No.6764/C as alleged by the plaintiff?

(2) Whether suit property bearing Survey No.6764/C is of the joint ownership of the parties and that both the parties have equal right of passage, light and through the said suit property as contended by the defendant?

(3) Whether plaintiff is entitled to the reliefs claimed?

3. The learned Judge, after recording the evidence,

oral and documentary, led by the parties, came to the conclusion that the defendant no.1 had no right to put a door in the eastern wall of the property but she had a right to enjoy light and air through Survey No.6764/B by putting a jali in the said wall and that she had a right to discharge eaves water on Survey No.6764/C but she had no right to put water pipes or drainage so as to fall in the open space or galiari. On issue no.2, he found that Survey No.6754/C was of the joint ownership of the parties. The defendant no.1 had only a right of light and air through the said property and had no right of passage through the said survey No. The learned Judge also held that the plaintiff was entitled to a mandatory injunction directing the defendant no.1 to close the door which she had put in the eastern wall of her house and to remove the pipes. He, therefore, decreed the suit accordingly.

4. The defendant no.1 had, therefore, filed this appeal challenging the said decree.

5. The learned counsel for the appellant took me through the judgment and also the relevant portions of the evidence and submitted that the learned Judge had committed an error in recording the findings against the appellant.

6. Now, the evidence discloses that the ancestor of the parties was one Mohmedali who had four sons namely, Imamali, Roshanali, Hasanali and Ramzanali. Imamali had one son named Rehmuali who was the husband of defendant no.1. Roshanali had four sons Sarfuddin, Gulam Hussein, Fakruddin and Husnuddin. Husnuddin is the plaintiff in the suit. Sarfuddin had died leaving defendant no.2 as his heir. Gulam Hussein and Sarfuddin were said to have released their interest in the suit property in favour of the plaintiff and there was no challenge on this point. The rest of the defendants were the heirs of Sarfuddin and Gulam Hussein. The plaintiff's property bears Survey No.6765/D and this property opens in the west and on the west, there is the disputed land bearing Survey No.6763/C which is described as galiari. To the west of the galiari, there is the property of defendant no.1 bearing Survey Nos.6763/A and 6763/B. Admittedly, there existed an old house of defendant no.1 on the said two Survey Nos. It was demolished some time before the present suit was filed and the new house had been built. The plaintiff's case was that in the eastern wall of the old construction, there was a jalia on the ground floor and a window on the upper floor but, at no time, there was a door on the ground floor. The defence of the defendant

no.1 was that even in the old house there was a jali door in the wall and she had a right of passage through the galiari. Though the plaintiff stated in the plaint that defendant no.1 had no right to put any aperture in the wall, he gave up that stand at the hearing and he conceded the right of defendant no.1 to put a jali on the ground floor and a window in the upper floor but he asserted that the defendant no.1 had no right of passage through the galiari by putting any door on the ground floor. Thus, it was not disputed by the plaintiff that the defendant no.1 can enjoy light and air through the jali in the eastern wall. Now, both the parties examined a number of witnesses in support of their rival case as to the existence or non-existence of a door in the old house. However, the learned Judge, after referring to the said evidence, observed that the dispute between the parties can be resolved by referring to the documentary evidence on record and the oral evidence of the parties which can be regarded as interested is not of much help. He observed that the plaintiff's case found support from the documentary evidence.

7. The defendant no.1 had produced two old documents of the year 1921 at Exhs.28 and 29 but the Survey Nos. mentioned in the said documents did not tally with the present Survey No. However, there were other documents of the later years which threw light on the question involved in the suit. There was one sale deed executed by Imamali in favour of his son Rehmubhai Imamali. The said document referred to an earlier partition between him and his brothers which was made by a registered deed dated 22nd December, 1934 and at the said partition, the house known as shop came to his share and the house bore Survey Nos.6763/A and 6763/B. So, the said document related to the house which was now owned by defendant no.1. It was clearly mentioned in the document that in the back wall of the house, there was a jalia on the ground floor and a bari on the upper floor and eaves water fell in the said galiari. The second document was a will executed by the husband of defendant no.1 dated 28th January, 1947 (Exh.35) and in that document also, the same house was described and there was a recital that the eaves water of the property fell in the said galiari. There was also a mention of jalia on the ground floor and a window on the upper floor. The certified copy of the partition deed dated 22nd December, 1934 was also produced at Exh.40. The deed also showed that there was only a jali on the ground floor and a window on the upper floor and there was no door in the wall. Thus, in none of these old documents there was any mention of a door in the back wall of the defendant no.1's house. The learned

Judge, therefore, rightly found, relying on the documents, that there was no door in the old house, that defendant no.1 had no right to open a door in the eastern side wall on the ground floor and that she had no right of passage through the galiari by putting a door on the ground floor. In my opinion, the learned Judge has not committed any error in interpreting the said documents. There is, therefore, no substance in the present appeal. The same is, therefore, dismissed. No order as to costs.

(M.C. Patel, J.)

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